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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 342

THE HAYS CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF THE PETITIONER.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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It respectfully is submitted that, in his Memorandum in Opposition, Respondent is in error with respect to two fundamental points. First, Respondent assumes that there is a "continuity of interest" between the transferors (the shareholders of Metrotype Corporation) and Petitioner. This assumption is incorrect, because the transferors owned four-fifths of the capital stock of Metrotype Corporation prior to the transaction here involved, and subsequently became the owners of less than 8% of the capital stock of Petitioner corporation after the transaction. Thus, as originally contended by Petitioner, there was no "continuity of interest" on the part of the transferors, because more than 92% of the stockholders had an interest completely different from and alien to that of the transferors.

Second, Respondent assumes that because Congress has the power to postpone tax accounting—i.e., thus determine "when" a tax should be imposed, it also has the power to exact from a taxpayer, as a condition thereof, a "new basis on which to account for future dispositions," even to the extent that such exaction or condition results in an unconstitutional tax on capital. This is particularly true, in the instant case, when there would have been no tax to Petitioner at the time it issued its stock, since there is no income experienced on an original issuance of stock. § 1032(a) of the Internal Revenue Code of 1954, as amended, provides:

> "Nonrecognition of Gain or Loss.—No gain or loss shall be recognized to a corporation on the receipt of money or other property in exchange for stock (including treasury stock) of such corporation."

In his Memorandum in Opposition, Respondent states that:

> "...Such a specification of the kinds of transactions that will be treated as taxable events is plainly within the power of Congress to define 'income' for purposes of the Sixteenth Amendment."

The issue here is not a determination of "when" income or loss is experienced, *i.e.*, "taxable event," but whether or not income or loss is "actually" experienced. The petition, therefore, presents a substantial question of undecided constitutional law and should be granted.

Respectfully submitted,

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